OFFICE SUPREME COURT U. S.
FILED
JUL 14 1880
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE UNITED STATES
v.
RUEL HOUGH ET AL. } No. 16.

ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TENNESSEE.

PLAINTIFFS' BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

UNITED STATES
v.
RUEL HOUGH ET AL. } No. 16.

ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TENNESSEE.

PLAINTIFFS' BRIEF.

STATEMENT.

Suit upon the bond of Ruel Hough, as *agent for the sale of internal revenue stamps* in the first collection district of Tennessee (Record, 19). A Treasury transcript was put in evidence at the trial, showing a balance of $6,093.78 due to the United States (Record, pp. 21 to 26, folios 71 to 87); also, Mr. Hough's receipts for stamps. (Record, 26 to 35, folios 87 to 125.)

As *collector of internal revenue* there was due to Mr. Hough "for salary, commissions, and expenses," $6,434.75, which had been carried, by order of the Treasury Department, to the credit of the account of the collector as *disbursing* agent on the books of the Register of the Treasury (Record, 35, folio 125). Defendant offered in evidence the transcript showing this balance and order (*Ib.*), and the correspondence below

printed. The purport of it will be found to be that Mr. Hough (through his attorneys) asked to have this $6,434.75 allowed upon this claim now in suit, and the government declined to make the allowance, upon the ground that it was part of $15,453.63 accruing to him upon his disbursing account; all of which $15,453.63 had been already passed to his credit upon that account as collector, leaving a balance still due to the United States upon *that* account of $128,357.77; his whole indebtedness upon that account, without this credit, being $143,111.40,—which exceeded the penal sum of his bond as collector. His whole indebtedness, therefore, to the government, in both capacities, summed up very nearly to $150,000.

The correspondence on the subject offered in evidence by the defendant and received against the objection of the district attorney, who excepted thereto, is as follows:

"MEMPHIS, TENN., 16 *May*, 1871.

"Hon. HORATIO KING,
"*Washington, D. C.:*

"DEAR SIR: Will you present the inclosed to the 'proper accounting officer of the Treasury,' and make a formal offer to set it off against the claim the government has in suit *vs.* R. Hough, and the sureties on his bond as collector of internal revenue for the sale of U. S. inter. rev. stamps, now pending in U. S. dis. c't. dis't of W. Tenn., and procure a decision from the dep't, either allowing or disallowing the credit. If the credit is disallowed, please send me proof of the disallowance from the 'books of the Treasury,' if [*sic*] such presentation and disallowance, according to the rule laid down in the Supreme Court in the case of U. S. *vs.* Gilmore. (7 Wallace, 491, particularly pp. 493, 494).

"All certificates should be under the seal of the Treasury. Action upon this at once is desirable. Please advise me of your fee and I will remit the am't.

"Yours, truly,

"THOS. R. SMITH."

"Respectfully referred to the hon'ble 1st Comptroller, with request that the credit be given as stated in this letter.

"HORATIO KING."

"TREASURY DEPARTMENT,
"*Comptroller's Office, May* 20, 1871.

SIR: Hon. Horatio King has referred to me your letter of the 16th inst., in which you ask that the sum of $\$6{,}434\frac{75}{100}$, found due by Fifth Auditor's report No. 1833, dated June 6, 1868, to Reul Hough, esqr., late collector of internal revenue in the first district of Tennessee, on account of his compensation as collector of revenue, be carried to his credit under his bond as agent for the sale of internal revenue stamps.

"The sum found due by the report referred to was, according to the uniform practice of the department, carried to his credit as disbursing agent for the payment of the expenses of assessing and collecting the revenue, and the moneys now due to him are due on the latter account, and not on his compensation account. On his disbursing account, there appears due to Mr. Hough the sum of $\$15{,}453\frac{63}{100}$, which has been directed to be put to his credit in his account as collector of revenue, and under his bond as collector. I must therefore decline to comply with your request.

"The books of the department show Mr. Hough to be indebted to the United States, on account of collections of internal revenue, not including his stamp account, in the sum of $143,811.40; and after deducting the $15,453.63, he is indebted in the sum of $128,357.77, which is greater than the amount of his bond as collector.

"Mr. Hough has no right to ask the credit which you request. *The money due him on his disbursing account has no connection whatever with his stamp account*, but, on the contrary, is directly and solely due him as collector of internal revenue, and it should be credited to him on his revenue account. To credit it in his stamp account would be inexcusable; it would take from the

government that sum of money, inasmuch as his revenue balance greatly exceeds the amount of his revenue bond, and if it did not exceed the bond, to give the credit you ask would be to cast just that much greater burthen upon the sureties on the revenue bond, who, in the very nature of the case, ought to have the credit on the liability existing against them.

"I am, very respectfully,

"R. W. TAYLER, *Comptroller.*"

"MEMPHIS, TENN., 24 *May*, 1871.

"Hon R. W. TAYLER,

"*Comptroller of Treasury, Washington, D. C.:*

"SIR: I have the honor to acknowledge your letter of the 20th, declining to allow cr. of $6,434.75 of Reuel Hough's stamp a/c, as requested in my letter of 16th, because it 'has been directed to be put to his credit in his account as collector of revenue.'

"Will you please give me the *date* at which it was actually placed to his cr. on his a/c as collector?

"Respectfully, y'r ob't s'v't,

(Signed) "THOS. R. SMITH."

"TREASURY DEPARTMENT,

"*Comptroller's Office, May 31st*, 1871.

"THOMAS R. SMITH, Esqr.,

"*Attorney for Reuel Hough, Esqr.,*

"*No. 22 Madison Street, Memphis, Tenn.:*

"SIR: In reply to your inquiry of the 24th inst., asking on what date the sum due to Mr. Reuel Hough, as late disbursing agent 1st district of Tennessee, was actually placed to his credit on his account as collector, I have to state that the Solicitor of the Treasury, under date of *May 4th instant*, gave the necessary instructions to the U. S. district attorney at Memphis, under which the amount referred to is to be allowed as a partial offset to the balance due from Mr. Hough on his revenue account.

"Very respectfully,

"R. W. TAYLER, *Comptroller.*

"Defendants then offered this deposition of Reuel Hough, which was read subject to an exception taken by the district attorney:

"My name is Reuel Hough; residence, Boston, Mass.; age, fifty-six. I am an engineer by profession; am in no active business now. I am one of the defendants in this case; the principal defendant. I was collector of internal revenue at Memphis, Tennessee, appointed in 1863, & vacated the office, I think, November 6th, 1866.

"I am the principal party to the bond in suit in this case; that bond was given in September, 1864, for $25,000 for stamps; there was a previous bond given November 23, 1863, for $10,000 for stamps; there was another bond given for $100,000 in 1863, as collector. The appointment was made during the recess of Congress, and consequently, after I was confirmed, I gave another bond in 1864 for $100,000; I also gave a bond somewhere in latter part of 1864 as disbursing officer. I think the amount of that bond was $80,000. 'In 1865 the State was redistricted, & my district was divided into two districts, the seventh & eighth.

"I was subsequently appointed collector for the eighth district; was confirmed by the Senate; required to send my bond, and did so; the commission was never issued on that bond, but another man, named Saunders, was appointed to the eighth and was qualified, I think, in November, & I, vacated the office as far as the eighth district was concerned, but I still held the seventh, there being no collector appointed at that time. Early in 1866, I think about February or March, I delivered the papers of the seventh district over to the officer appointed to take charge. When I left the office in 1866 there was a balance due me from the government for disbursements made on account of the government of at least $7,000.

"In 1866 or 1867 the Auditor found & certified to me that there was a general balance on disbursing account, salary account, commissions, postage, & stationary of about $12,000 due me from the government—between twelve & thirteen thousand dollars. I don't recollect the exact amount; the papers are all in the case & I cannot now refer to them. I have never drawn any por-

tion of that. It was not at that time applied to any particular account. Much of the balance due the government on stamp account was used by me as disbursing officer in settlement of accounts due from the government, in paying salaries of assistant assessors principally. These advances from the stamp account were made by me in anticipation of warrants as per estimates rendered the government. Some time before this suit was brought, I think about 1867, I was notified from the district attorney's office that they had orders to sue on this account. I saw the district attorney & notified him of the balance that stood to my credit from the government, & I wrote to the department in Washington, to the Commissioner of Internal Revenue, asking that this balance or sufficient of it might be applied on the stamp account, and I made the same request verbally of the United States district attorney himself. No part of this balance had been applied to any account up to that time. The balance was enough to have twice paid the deficiency in the stamp account. I have never received any of that balance, or consented in any way to any other application of it. I told Mr. C. B. Church, one of the sureties on the bond in suit, that I had made that request of the government, & that he was, as I supposed, discharged from liability on the bond; this was before the suit brought on this bond.

"I can't fix the exact date of my communication to the Commissioner above referred to any more accurately than I have done. The letter was forwarded by mail addressed to the Commissioner of Internal Revenue on one of the usual printed envelopes furnished by the department. The letter referred directly to the amount they claimed for stamps, & contained a direct request that enough of the balance due me from the government on general account be applied to settle it. I had made a similar request previously, more than a year before this time, by mail to the Commissioner of Internal Revenue, addressed upon the usual printed envelope of the department. I cannot give the substance of my letter to the department after seeing the district attorney any

more particularly than I have above, nor can I give the previous letter any more particularly.

"Defendants then introduced Treasury transcript of account between the United States and Reuel Hough, as *collector*, showing a balance due to the collector from the United States on 30th June, 1865, of $94,000; also, Treasury transcript showing balance due from collector to the United States on 30th June, 1866, of $11,000; and that, in the account showing this balance against the collector was included charges of tax-lists charged to him for future collection largely exceeding $11,000 in amount; also, Treasury transcript of account between said Hough, collector, and the United States, showing that in the account stated up to Oct. 31, 1866, there is deducted for credits allowed to the collector an item, thus: 'Stamps, $10,000,' leaving the credits less by the amount of $10,000; also, a Treasury transcript showing that on 20th Sept., 1871, there was credited to the collector, Reuel Hough, and covered into the Treasury, the sum of $15,453.63, which had before that time stood on the books of the Treasury to the credit of said Hough, as disbursing agent, and that said amount of $15,453.63 embrace the amount of $6,434.75, placed to the credit of said Hough, as disbursing agent, in account stated up to June 30, 1866, for salary, commissions, and expenses.

"In this cause it was agreed by the defendant's counsel that the officers of the Internal Revenue Department at Washington, D. C., to whom the defendant, Hough, swears in his deposition that he sent direction to apply a sufficient of the amount standing to his credit on his account as collector & disbursing agent of the 1st district of Tenn., to discharge his liability as stamp agent, will swear that they have no recollection that such instruction was ever received by them, and that the present officers of the Internal Revenue Department will swear that they have searched their offices where such communications should have been kept, and that no such communications are to be found or any evidence that they ever existed.

"The district attorney then read to the jury from the account of the defendant, Hough, as collector of 1st col-

lection-district of Tennessee, properly certified to by the Treasury Department under bond dated September 16th, 1864, which account showed that on the 20th day of September, 1871, the date at which $15,453.63 was applied as a credit on said Hough's account as collector, that said Hough, as such collector, was indebted to the United States the sum of one hundred and forty-three thousand dollars under said bond of Septr. 16th, 1864.

"This was all the evidence in the case.

"The district attorney asked the court to charge the jury in the words and figures following:

"The district attorney asked the court to charge the jury that if they found from the evidence that there was standing on the books of the department a credit to Hough, as disbursing agent, and if they also found that Hough was indebted to the plaintiffs on his bond as collector, then, and in that event, the United States, through the proper officer of the department, would have had the right to have applied such credit to Hough's account as collector, notwithstanding Hough had directed such credit, as disbursing agent, to be applied as a credit on his account as agent for the sale of stamps, and that the plaintiff would be entitled to recover of all the defendants.

"The district attorney further asked the court to charge the jury that, under the bond sued on in this case, the sureties of Hough are liable for all amounts of stamps, vellum, parchment, or paper, or adhesive stamps, which the proof shows had gone into the hands of Hough as such stamp agent, both before and since the execution of the bond, unless the same had been properly accounted for by said Hough.

"The district attorney further asked the court to charge the jury that under the proof in this cause the plaintiffs are entitled to recover the amount shown to be due the United States by the account read in evidence, with 6 per cent. interest on said amount from June 30th, 1869, to this date.

"The district attorney further asked the court to charge the jury that if they find from the proof that no

demand was made by Hough to have the amount standing on the books of the department to his credit as disbursing agent credited to his account as stamp agent until 1871, and at that time Hough was indebted to the U. S. on his bond as collector, then, and in that event, the officer of the department would have had the right to have applied such credit to Hough's account as such collector, notwithstanding Hough might have directed a different appropriation of such credit, and in that event their verdict must be for the plaintiffs against all of the defendants.

"Which instructions the court refused to give (and the district attorney excepted) but charged the jury as follows:

"The court instruct the jury that the bond sued upon creates no liability against the defendant for any stamps received by Hough, as stamp agent, subsequent to 30th June, 1864, and that the account of Hough, as stamp agent, exhibited by the pl'tiffs in evidence, is to be examined by them in order to ascertain what debts existed prior to June 30, 1864. Payments made on that account and entered to the credit thereof, are to be applied to the debts in order of time, and if they find that there are credits on said account, not derived from the sale of stamps subsequent to June 30, 1864, of sufficient amount to extinguish the items of debt prior to June 30, 1864, they will find for the defendants. As to the last credit there of $10,000, if they shall find that it was brought from the general collector's account, and did not grow out of stamps, it should be applied to the oldest debt item in the account, and if they find it sufficient to extinguish the items older than June 30, '64, they will find for the defendants.

"Upon the question of set-off the court was asked by the defendants to instruct (and did instruct) that Hough had the legal right up to 1868, to appropriate the amount of $6,434.75 allowed him for salary, commission, and expenses on 30 June, 1866, and placed to his credit as disbursing agent. And if they find that he did direct

in 1866 or 1867, that the same should be applied to the stamp account, that they will find for the defendants.

"If they find that it was not appropriated by Hough nor the government before Sept., 1871, then it is the duty of the court to apply it, and the court directs the jury to apply it, to the stamp account, and if it is enough to pay the balance due on that account, they will find for the defendants." (Record, 35 to 42.) The district attorney excepted.

ASSIGNMENT OF ERRORS.

The court below erred in these particulars, viz:

1. In admitting the above printed correspondence. (Record, 35 to 37.)

2. In admitting the deposition of Ruel Hough. (*Ib.*, 38, 39.)

3. In refusing to charge the jury, as requested by the district attorney, that "if they found from the evidence that there was standing upon the books of the department a credit to Hough, as disbursing agent; and if they also found that Hough was indebted to the plaintiffs on his bond as collector; then and in that event, the United States, through the proper officer of the department, would have the right to have applied such credit to Hough's account as collector, notwithstanding Hough had directed such credit as disbursing agent to be applied as a credit on his account as agent for the sale of stamps, and that the plaintiff would be entitled to recover of all the defendants." (*Ib.*, 41, folio 148.)

4. In refusing, upon like request, to charge the jury that, "under the bond sued on in this cause, the sureties of Hough are liable for all amounts of stamps, vellum, parchment, or paper, or adhesive stamps which the proof shows had gone into the hands of Hough as such stamp agent, both before and since the execution of the bond, unless the same had been properly accounted for by said Hough." (*Ib.*, 41–42.)

5. In refusing to charge, as requested, that, under the proof in this cause, the plaintiffs are entitled to recover the amount shown to be due the United States by the

account read in evidence with six per cent. interest on said amount from June 30, 1869, to this date. (*Ib.* 42, top.)

6. In refusing to charge the jury, upon the district attorney's request, that "if they find from the proof that no demand was made by Hough to have the account standing on the books of the department to his credit as disbursing agent credited to his account as stamp agent until 1871, and at that time Hough was indebted to the United States on his bond as collector, then and in that event the officers of the department would have had the right to apply such credit to Hough's account as such collector, notwithstanding Hough might have directed a different appropriation of such credit, and in that event their verdict must be for the plaintiffs against all the defendants." (*Ib.*; folios 149, 150.)

7. In instructing the jury that "the bond sued upon creates no liability against defendants for any stamps received by Hough as stamp agent subsequent to June 30, 1864, and that the account of Hough as stamp agent, exhibited by the plaintiffs in evidence, is to be examined by them in order to ascertain what debts existed prior to June 30, 1864." (*Ib.*; folio 151.)

8. In instructing the jury that "payments made on that account and entered to the credit thereof are to be applied to the debts in the order of time, and *if they find there are credits upon that account, not derived from the sale of stamps subsequent to June* 30, 1864, of sufficient amount to extinguish the items of debt prior to June 30, 1864, they will find for the defendants." (*Ib.*)

9. In instructing further, relative to said account, that, "as to the last credit there of $10,000, if they shall find it was brought from the general collector's account, and did not grow out of stamps, it should be applied to the oldest debt item in the account, and *if they find it sufficient to extinguish the items older than June* 30, 1864, they will find for the defendants." (*Ib.*; folio 152.)

10. In complying with the defendants' request to instruct, upon the question of set-off, "that Hough had the legal right up to 1868 to appropriate the amount of

$6,434.75 allowed him for salary, commission, and expenses on June 30, 1866, and placed to his credit as disbursing agent. And if they find that he did direct in 1866 and 1867 that the same should be applied to the stamp account, and it was enough to settle the stamp account, that they will find for the defendants. If they find that it was not appropriated by Hough nor the government before September, 1871, then it is the duty of the court to apply it, and the court directs the jury to apply it to the stamp account, and if it is enough to pay the balance due on that account they will find for the defendants." (Record, 42, bottom.)

11. In entering up judgment for the defendants. (Record, 18, bottom.)

BRIEF.

I.

The correspondence objected to and admitted (Record, 35 to 37) was offered to prove a claim for credits under this section of R. S.:

"SEC. 951. In suits brought by the United States against individuals, *no claim for a credit shall be admitted*, upon trial, *except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed*, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

1. There is nothing to show any reason why Thomas Smith should present such a claim. He is not the attorney of record of any party to this cause, nor is he shown to have been the attorney in fact of anybody connected with the case.

2. The presentation and disallowance should have been proved by a transcript of the records and proceedings of the Treasury, and not by what purport to be *copies* of a correspondence. U. S. *v.* Patterson, Gilpin, 48, bottom; U. S. *v.* Gilmore, 7 Wallace, 494, middle. If not obliged to rely upon a certified transcript, the defendants have shown no right to introduce copies uncertified and objected to when offered. They were objected to as incompetent & irrelevant; *i. e.*, not competent, if relevant, and not relevant, if competent otherwise.

The second section of the act of March 3, 1797, c. 20, 1 Stats., 512, 513, makes *certified* copies evidence, and those only. R. S., sec. 886, cited *infra*.

according to the terms of the statute (R. S., §3427; 13 Stats., 297) and of his bond (Record, 2, folio 6) to make "*returns*" monthly to the Commissioner of Internal Revenue, yet that functionary is no more an "accounting officer" than is the district attorney. It is noticeable that the section mentioned declares he shall make returns, instead of rendering an account, and the bond is conditioned accordingly (Record, 19, folio 64). See also, 13 Ct. of Clms. Reps., 304.

So, instead of proving compliance with the law (R. S. § 951), Mr. Hough's deposition proves affirmatively that he has not complied with its requirements.

III.

The instruction requested, affirming the government's right to apply the credit upon the disbursing account to reduce the indebtedness upon the collector's account (Record 41, folio 148), should have been given.

Under the internal-revenue laws as they existed prior to March 3, 1865, the collectors levied the taxes committed to them by the assessors, and paid all expenses, including their own salaries and commissions, &c., out of the collections, remitting the balance only to the Treasury. By act of that date, c. 78, § 3 (13 Stats., 483), it was provided that, after the close of the then current fiscal year, the gross amount of all collections and revenues arising under internal-revenue laws, including those accruing from the sale of stamps, should be paid *daily* into the Treasury of the United States "without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description whatever, anything in any law to the contrary notwithstanding." (13 Stats., 483, § 3; R. S., § 3210.)

The next section appropriated "so much money as may be necessary for the payment of the lawful expenses incident to carrying into effect the various" internal-revenue laws; and made it the duty of those collectors designated by the Secretary of the Treasury "to act as disbursing agents *to pay the aforesaid expenses, without increased*

compensation therefor, and *to give good and sufficient bonds* and sureties for the faithful performance of their duties as such disbursing agents," &c. (*Ib.*, § 4.)

Thus, it will be seen, Mr. Hough had given *three* bonds to the United States, viz, one as collector; another as a designated disbursing agent; and the third (being the one in suit) as agent for the sale of stamps. Upon the first there was found due from the collector to the United States upon adjustment, $143,811.40; upon the second the apparent balance in his favor was $15,453.63; upon the third he was found to be owing the $6,093.78 claimed in this suit. (Record, 36, folio 128; 41, folio 147.)

The plaintiffs claim that they had the right to direct, and had directed, the application of this $15,453.63 to the diminution of the sum due upon the bond given *as collector*. The defendants asserted the right, and were permitted by the court, to apply sufficient of it to the cancellation of the balance due arising from the sale of stamps, sought to be recovered in this action.

The materiality of the application is, that the penal sum of his bond as collector was but $100,000, while his indebtment on that account was $143,811.40; so that, applying the whole $15,453.63, only reduced that liability to $128,357.77, and did not relieve the sureties upon that bond in the least; whereas, if a sufficient fraction of the disbursing-account balance could be diverted to this stamp account, it would relieve the sureties upon this bond altogether, and the government would have to lose that amount, unless it could be collected of Mr. Hough himself. If this had been possible, there would have been no recourse to his sureties at all.

The district attorney's request claims for the government the right to control the application of the balance accruing upon the disbursing account.

The facts recited in the exceptions present this claim in this case in two aspects:

First. Had the government the right to apply this sum to the collector's account after a contrary direction *to the proper officer* by Mr. Hough?

Second. Had the government the right to make that application if done *before* any different direction had been received from Mr. Hough by the proper official?

1. Had the government the absolute right to control the application of this disbursing-account balance so far as to carry it to the diminution of that found upon adjustment of the collector's account? Was there aught which made it more properly applicable to this account than to the stamp account?

The relation of the parties clearly discriminates this case from the ordinary one of debtor and creditor merely. (United States *v.* January, 7 Cranch, 575.) Mr. Hough, it is true, was and is a debtor to the United States; but he is more. He is a heavy defaulter. That is to say, the funds as to which he is delinquent were of themselves and always the property of the United States. Ordinarily, transmitting or paying *his own* money, a debtor may say to which of two debts he desires to have it applied; but an agent collecting funds for a principal, cannot assert a positive right to *dictate* their application to any particular account between them. (Morse *v.* Woods, 5 N. H., 297, 300, per Richardson, C. J.) The principal applies it at pleasure (as between him and his agent), so long as he does not apply it contrary to the legal requirement of the source from which it is obtained (*ex gr.*, he cannot apply moneys received by his agent from A upon the account of B), and the agent cannot control his discretion.

These funds were the funds of the United States. In Hough's possession, they were in the possession of the United States. (Sprague *v.* Steam Nav. Co., 52 Me., 593; Bowker *v.* Hill, 60 Maine, 175.)

So the government could control their disposition, provided its action did no *legal* wrong to the collector, or any surety, or other person interested. Of course, principal and sureties upon his disbursing bond could rightfully claim to have the disbursements made by him applied to that account; but a balance of that account can be applied at discretion, without injuring these par-

ties or denying to any other his legal right. The sureties cannot be considered simply as sureties. (Harding *v.* Tifft, 75 N. Y., 461; Gordon *v.* Hobart, 2 Story, 244, 264, bottom; Wilcox *v.* Fairhaven Bank, 7 Allen, 270; Hargraves *v.* Cooke, 15 Geo., 329, § 8; Post, p. 35, lower half.) And if the money is received generally, without any knowledge or notice of the source from which it is derived, the recipient may apply it at will to any outstanding claim against the sender; nor will any subsequent development of the method of procuring the remittance change the application. (75 N. Y., 461; State *v.* Smith, 26 Missouri, 226, cited *infra;* Colerain *v.* Bell, 9 Metcalf, 499.)

The facts justified the application of these funds made by the Treasury officials (*ante*, pp. 3 and 4).

Prior to June 30, 1865, the collector was authorized to pay expenses, salary, and commissions (in other words, the very items which make up this $6,434.75) *out of his tax collections* (*i. e.*, out of the sum charged against him as collector of internal revenue), and not out of the proceeds of stamps, which he was to return and be credited therefor upon the sum charged against him, as agent for the sale of stamps, for stamps delivered to him.

After that date, conformably to the provisions of the act of March 3, 1865, c. 78, § 4 (13 Stats., 483; R. S., § 3144), before cited (*ante*, 16), the funds to pay these charges were advanced to him, upon the security of his bond as disbursing agent.

As collector of internal revenue, Mr. Hough was paid salary, commissions, and expenses; as agent for the sale of stamps he received commissions only, as appears by the law and the record (pp. 25, 26); while as disbursing agent he received neither salary nor commission, the right to any compensation for services in that capacity being expressly denied by the statute aforesaid. (13 Stats., 483, § 4, R. S., § 3144; *ante*, p. 16, lower half.)

For his commission on stamps he received full credit, as is shown by the statement of that account in the record, at pages 25 and 26.

Then it necessarily follows that *the salary, commissions, and expenses which make up the sum of $6,434.75 in question accrued to him only in his capacity as collector of internal revenue.* They were attached and incident to that office, necessary for carrying on its operations, and not at all connected with the sale of stamps. This connection between the collector's account and disbursing account required the balance found due him upon stating the latter to be deducted from what he owed on the former; and no direction of his, even if seasonably given and properly communicated, can change the legal effect of this connection. (Gwinn *v.* Whittaker, 1 Har. & J., 755, per Chase, C. J.; Suter *v.* Ives, 47 Md., 520, 540; Williams *v.* Schwab, 56 Miss., 338; Levystein *v.* Whitman, 59 Ala., 346, top; 3 Am. Law Reg., O. S., for Oct., 1855, pp. 705, 728.)

R. S., section 3624, provides that "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance *reported* to be due to the United States upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the *commissions* of the delinquent, which shall be forfeited in every instance where suit is commenced and *judgment obtained* thereon, and an interest of six per centum per annum from the time of receiving the money until it shall be repaid into the Treasury."

The case shows Hough in default *as collector* for more than $143,000.

It also shows, as above indicated, that the *commissions* which go to make up the $6,434.75, of which he claims to control the application, accrued from his collections in that capacity. Consequently, in the event of "judgment obtained" against him upon his collector's bond, those commissions "shall be forfeited." Certainly, then, he cannot anticipate that judgment and avert its consequences by any prior direction as to the credit of these commissions. He cannot control them so long as there is even a contingency which may happen to deprive him

of them altogether. On the contrary, commissions already allowed should be reclaimed.

Reference to R. S., section 1766, shows further that "No person" in default can obtain *any* compensation "until he has paid into the Treasury *all sums for which he may be liable.*"

Can he so control the disposition upon the books and accounts of the Treasury of the compensation due as to give it the effect of a payment to him? Certainly not. It may well be that, "until he has paid into the Treasury all sums for which he may be liable," Mr. Hough was not entitled to have the amount credited upon *any* account; but certainly he cannot *direct* its entry upon any particular account. It is only of funds which a debtor *can* control that he is entitled to make an appropriation. See *infra*, pp. 23–25, ¶ 3.

There was no *payment* by Hough of this $6,434.75, to which he could give direction. (Morse *v.* Woods, 5 N. H., 301, cited *sup.*; 3 Am. Law Reg., O. S., for Oct., 1855, p. 706.)

The $15,453.63 of which it was part had been paid in by him upon his disbursing account. To each of the payments composing this sum he had given this direction when he placed the funds in a public depository for transmittal to the Treasury, or when he forwarded vouchers as evidence of his disbursements. The balance resulting from adding up the sum of remittances to him on the one side, and that of vouchers, salary, and commissions upon the other, was not of itself a payment. The payments were made long before. His power to direct their application had been exercised and exhausted. As to any overpayment, he left the application of that to the accounting officers. The fact is that this apparent balance is really only additional evidence of the irregularity of the collector's accounts, which resulted in or from his defalcation.

2. The appropriation, even if made as alleged, was not properly made, and the instruction requested should have been given.

I proceed now upon the assumption that full credit is accorded to the statements of Hough's deposition on this point—although I do not suppose any of us really believe that statement.

It is that in 1867, or thereabouts, he saw the district attorney, and notified that officer of the balance standing to his (H.'s) credit, verbally asking to have sufficient of it so applied as to cancel the stamp account, and wrote to *the Commissioner of Internal Revenue* to the same effect; which he had also done a year or so before. (Record, 39; *ante*, p. 6.)

The Commissioner of Internal Revenue is no more an accounting officer, and has no more to do with the statement of the debt and credit items which make up an account, than has the district attorney, as has been already observed.

The communication was nugatory as an application for credits. It was felt to be so; therefore another abortive effort was made to comply with that statute, as before noticed. If ineffectual as an application, it is equally so as an appropriation of payments, and for the same reason. The United States can only act through officers. A notice or request, to be effective, must be made to the *proper* officer—to the one who can act in the premises, according to the facts. A similar notice to the porter, housekeeper, or cash-boy of an individual would be a nullity. (Heilbron *v.* Bissell, Bailey Eq., *430.)

Inasmuch, therefore, as there was no *effective* and proper notice of application prior to May 4, 1871, when the Solicitor of the Treasury, who by law has charge of these suits (R. S., sec. 1766), in compliance with the adjudication of the accounting officers, directed its application to reduce the balance of the account as collector, the government had a right to make the application.

The correspondence of Mr. Smith with Mr. King and the Comptroller commenced May 16, 1871 (Record, 35, bottom), and did not profess to relate to an appropriation of payments, but to an application for credits. If these are or amount to the same thing, then recourse was not had to the proper officer, as the Fifth Auditor

was the one to first pass on the question, and he was not even consulted.

3. Nor was the application, even if made as asserted, *seasonable.*

The decisions are multitudinous and uniform that the application by the debtor must be *at the time of payment*, and that he cannot exercise the right afterward, if he then omit to indicate his election. (Alexandria *v.* Patten, 4 Cranch, 317; Sherwood *v.* Haight, 26 Conn., 432; Rackley *v.* Pearce, 1 Ga., Kelly, 241–2; Tredwell *v.* Moore, 34 Maine, 112, per Appleton, J.; United States *v.* Bradbury, 2 Ware, being 1 Davies, 146; Stewart *v.* Hopkins, 30 Ohio St., 502, 540, top; Levystein *v.* Whitman, 59 Ala., 345, bottom; Bell *v.* Radcliff, 32 Ark., 665, middle; Harding *v.* Tifft, 75 N. Y., 261.)

"I think the rule to be gathered from the cases is, that if no specification be made by the debtor *when he pays*, he cannot afterwards make it. If he does not make a *distinct* appropriation at the time, the right is lost to him, and he is not entitled to come at any period of time afterwards to make it." (D'Arcy *v.* Burke, 2 Irish Eq. Rep., 10, per Lord Plunket, Ch.)

"There was no direction as to the application of the payments by the defendants *at the time* the several sums were paid, or previously. Their right to control the same was gone with *the ownership of the money*, and could not be subsequently asserted." (Haynes *v.* Waite, 14 Cal., 448, per Field, C. J., quoted further *infra.*)

Such is the law in Tennessee. (Reynolds *v.* McFarlane, 1 Overton, Tenn., *487.)

I have already observed that the power to control the money was not in Mr. Hough when he assumed to apply the disbursing-account balance to his stamp account. This control is the foundation of his right of appropriation at the time of payment, as is shown by all the cases, and recognized in the language employed by Judge Field. (See also 1 Am. Leadg. Cases, Hare & Wal.'s notes, 4th ed., p. 294, bottom.)

With relation to a balance of deposits standing upon

a bank's book to the credit of one who died largely indebted to the bank, the court of North Carolina, per Gaston, J., said, more than seventy-five years ago:

"Whatever claim the late John Armstrong had against the plaintiffs, it arose not from *special* but from *general* deposits. He had not placed in the custody of the officers of the bank money in bags or boxes to be kept distinct from the funds of the bank and to be returned to him *in specie*. Had this been the case, the identical money so deposited would have remained his property in their hands as bailees. * * * The deposits were general. * * * They were incorporated into the mass of the funds of the plaintiffs, became their property, and entitled him to a general credit for the amount thereof in account. * * * It is not to be doubted also but that they [the bank officers] had a right to apply his funds in their hands to the payment of any note or acceptance of his held by them [citing cases]. * * * The argument by which the defendants endeavor to sustain their asserted right is understood to be this: the money standing on the running account to the credit of Armstrong at the time of his death was the money of his administrator, and he had the right to apply it as he pleased. The refusal of the bank to let him have control of this money gave him an election to consider it as money paid to the bank. There were two demands of the bank against his intestate, and of course against the administrator as the representative of that intestate. A debtor making a payment has the right to apply the sum paid to either of the demands of the creditor, and the debtor here, by the plea of payment to this action, has directed the application to this debt. We have felt ourselves bound to consider this argument attentively, not only because of the respect due to the able counsel who argued it [Hon. Geo. E. Badger], but because of the still greater respect due to the decision which is supposed to sanction it, and which the appeal [from Judge Seawell, of the superior court] brings before us for review. The result of that examination has not been to satisfy us of the correctness of the argument.

"However for some purposes the phrase may be allowed that the balance on the running account in favor of Armstrong at his death was *the money* of his administrator, we have seen that, legally speaking, it was *not his money*. * * * A debtor who makes an actual payment, with his own money, has a right to direct its application, because *it is his money* [the italics of the original are preserved throughout this quotation], and he alone has the legal control over it." (State Bank *v.* Armstrong, 4 Dev., Law, 523, 524, 525, and 526. See next case in same volume, State Bank *v.* Locke, *Id.*, 529, 533, per Ruffin, C. J.)

4. "If the debtor, at the time of payment, does not make the application, the creditor may, *at any time*, apply it to which demand he pleases." (Brady *v.* Hill, 1 Mo., 226, bottom, citing and adopting Alexandria *v.* Patten, 4 Cranch, 317, 320, where Marshall, C. J., observes: "If he [debtor] fails to make the application, the right passes to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it; but until he makes it he is free to credit either the bond or simple contract.")

"There was no direction as to the application of the payments by the defendants [debtors] at the times the several sums were paid, or previously. Their right to control the same was gone *with the ownership of the moneys*, and could not be subsequently asserted. The right subsequently belonged to the creditors, and could be exercised by them at any time previous to the institution of the suit. There is authority even for the position that it will be sufficient if the appropriation be declared *at the trial*, but it is unnecessary in the present case to carry the authority of the creditor to that extent. * * * The general doctrine that the right of appropriation rests with the creditor until suit brought, the debtor having neglected to exercise his right at, or previous to, the payment, is clearly established by the weight of authority in England and in this country [cases cited]. * * * There are expressions in some of

the adjudged cases to the effect that the creditor's right of appropriation must be exercised within a *reasonable* period. Hare and Wallace refer to them in their note. 'There are a few *dicta*,' these writers observe, 'requiring that the application be made within a *reasonable* time [citing dicta]. * * * But the true principle appears to be that established in Alexandria *v.* Patten, that if the creditor has once made the appropriation, whether by verbal declaration, or rendering an account, or by conduct inducing a reliance on a particular appropriation, or *by bringing suit in a way which declares the application*, he cannot change it; and this is the point in [cases cited]; but, subject to this, he may make the application *at any time* [italicized in the report]. There is a *dictum* of Judge Story in United States *v.* Kirkpatrick (9 Wheaton, 720, 737); repeated in [two state cases cited], that the application cannot be made by the creditor after controversy has arisen. If by this is meant that after the creditor has declared his application and a controversy involving that point has arisen, he cannot change his ground, it is no doubt true, but its correctness in any other sense cannot be admitted." (Field, C. J., in Haynes *v.* Waite, 14 Cal., 449, 450, before cited. See, also, Holmes *v.* Pratt, 34 Georgia, 558; Forelander *v.* Hicks, 6 Ind., 448; Fargo *v.* Buell, 21 Iowa, 292, per Wright, J.; Dwinel *v.* Sawyer, 53 Maine, 24; Mitchell *v.* Dall, 4 Gill & J., 361; Bird *v.* Davis, 14 N. J. Eq., being 1 McCarter, 467; Smith *v.* Screven, 1 McCord, 568; Patterson *v.* Hull, 9 Cowen, 747, 765; and Shepherd *v.* Steele, 43 N. Y., 52; Heilbron *v.* Bissell, Bailey Eq., 430.)

The creditor may make his election at the time of trial. (Ramsey *v.* Warner, 97 Mass., 13, 14, cited infra; Larrabee *v.* Lumbert, 32 Maine, 98.)

The creditor elects at pleasure among existing debts. After taking bond for one debt he may assign a general payment to prior simple debt. (Kirby *v.* Marlboro, 2 M. & S., 18, per Ellenborough, C. J; Williams *v.* Rawlinson, 10 Moore, 362, 369, per Best, C. J.)

He may apply payment to a debt already barred by the statute of limitations, or, if the debt be not barred

at time of payment, he may, *at the time of trial*, so apply it as to prevent the operation of the statutory bar, which would then intervene, although he made no such application when he received the money. (Ramsey *v.* Warner, 97 Mass., 13, 14, per Hoar, J., who says: "The fact that the application does not appear to have been made until the suit was brought is not material. The creditor has a right to make it at any time. Mills *v.* Fowkes, ubi supra. And when it is made it takes effect from the time of the payment, and not from the date of the application." 97 Mass., 14.)

In Jackson *v.* Burke (1 Dillon, 311), the payment was applied to eleven different notes, so as to take them all out of the statute.

It may likewise be applied to a debt not suable under the statute of frauds. (Haynes *v.* Nice, 100 Mass., 327.)

Having the right to appropriate at any time, the creditor may wait to ascertain how the several accounts or claims stand before indicating to which he will apply the payment. (Stewart *v.* Cochran, Bailey Eq., *380, per De Saussure, Ch.; Heilbron *v.* Bissell, *Id.*, *430, per Harper, Ch.)

A bank was allowed to apply a balance standing on its books to pay the cashier's note, after he became a known defaulter, instead of in reduction of his bond; "*because he was not in fact their creditor to that amount, but largely their debtor.*" (Dedham Bank *v.* Chickering, 4 Pick., 314, 341, top; Capen *v.* Alden, 5 Metcalf, 268.)

A bank held entitled to apply to a judgment upon a note a deposit made before suit brought. (Marsh *v.* Oneida Central Bank, 34 Barb., 298; approved in Nat. Bk. of Newburgh *v.* Smith, 66 N. Y., 271.)

5. If no application has been made by either party, the court makes it, "according to its own notions of justice" and equity. (U. S. *v.* Kirkpatrick, 9 Wheaton, 720, 737; Jones *v.* U. S., 7 Howard, 688; Chester *v.* Wheelwright, 15 Conn., 562; Randall *v.* Parramore, 1 Florida, 409, 428; Gwinn *v.* Whittaker, 1 Har. & J., 754–5, per Chase, C.

J.; Youmans *v.* Heartt, 34 Mich., 397, 401; Gaston *v.* Barney, 11 Ohio State, 506, 510; Oliver *v.* Phelps, 1 Spencer, (N. J.), Law, 180, 197; Bole *v.* Stickney, 36 Ala., 495, citing cases; Hargroves *v.* Cooke, 15 Ga., 322, 328–9; Hillyer *v.* Vaughan, 1 J. J. Marsh., 583, and Hammer *v.* Rochester, 2 *Id.*, 144, opinions per Underwood, J.; Solomon *v.* Dreschler, 4 Minn., 278.)

Under the Roman law, the creditor was bound to make that application which was most beneficial to the debtor; and the court did the same.

Judge Ware, in the before-cited case of U. S. *v.* Bradbury (2 Ware, 149), erred in declaring the agreement of the civil and common law in the method of appropriating payments by the court. It is not so at all.

On the contrary, the common law applies a payment, to which the parties have given no direction, to *the most precarious* debt. (6 Cranch., *28, and cases *infra.*)

"If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." (Marshall, C. J., in Field *v.* Holland, 6 Cranch, *28; Jones *v.* Kilgore, 2 Rich'd. Eq., 64.; Ramsour *v.* Thomas, 10 Iredell, Law, 165, 168, per Ruffin, C. J.; Moss *v.* Adams, 4 Iredell, Eq., 42; Blackstone Bank *v.* Hill, 10 Pick., 129, 133; Burks *v.* Albert, 4 J. J. Marsh, 97, per Buckner, J.)

"It is a well-settled rule that where a creditor has two claims against the same debtor, one well secured and the other not, upon a payment being made, the court will apply the same to the debt for which no security was taken; and by analogy of principle the court will make the same application of a set-off." (Planters' B'k *v.* Stockman, 1 Freeman's Ch., 502, 504; Johnson's Ap., 37 Penn. St., 274, per Strong, J.; followed in Foster *v.* McGraw, 64 Penn. St., 470, per Agnew, J., and affirmed in McKelvey *v.* Jarvis, 87 Penn. St., 418, per Sharswood, J.; Hilton *v.* Burley, 2 N. H., 196, per Woodbury, J.; Terhune *v.* Colton, 12 N. J., Eq., being 1 Beasley, 232.)

The case of Field *v.* Holland is the leading case upon the subject now under discussion, and is so adopted in Hare & Wallace's collection of American Leading Cases. In their notes to this case, and that of Alexandria *v.* Patten, these annotators say, under this head: "When no particular inference of intention can be made from the case, the court, it seems, will be guided by a general presumption of intention, founded on reason, probability, and justice. * * * By the civil law, that application shall be which is most beneficial to the debtor. It is believed that the rule of the common law is ***directly the reverse***, and that the general and predominant principle is that that application will be made by the law which it is to be presumed that the creditor would have made." (1 Am. Lead. Cas., 4th ed., 283.) The subject is further discussed and cases cited, the editors then remarking: "Suppose the court to be guided by its own notions of equity and justice, the equity in all these cases seems to be entirely and powerfully in favor of the creditor." (*Id.*, 284, bottom.) Again: "It is difficult to see how an equity can arise to a defaulter from the non-performance of his obligations. On the contrary, it is the moral duty of the debtor, as his breach of promise, necessarily, to some extent, injures the creditor, to see that when he does perform, out of time, a part of what he ought to have done in whole before, he shall do it in a manner to diminish as far as possible, or at least not increase, the loss of the creditor. The taking of security for a debt proves that the personal security of the debtor was insufficient to procure the loan, or the indulgence in the payment, and shows that a favor has been conferred by the creditor, who certainly acquires an equity that his indulgence shall not prove an injury to him, and that his rights shall be protected in the debtor's provision for obligations that are equally due in conscience. The authorities are all but unanimous in establishing the principle that the law will apply a payment to the debt which is least secured." (*Id.*, 285.)

For a severe and rather unusual application of the doctrine that the rights of the creditor are to be re-

gard'ed, see the opinion, per Woodward, C. J., in Smith *v.* Brooke. (49 Penn. St., 147, 150.)

It has already been remarked that the circumstance that the liability of sureties is concerned in the application made is immaterial. The case of Hargroves *v.* Cooke, 15 Ga., 329, has also been cited, where the court say: "The law is clear—a guarantor or surety merely, as such, having no equity to change an application of payments made by the creditor;" citing Alexandria *v.* Patten, and Hare & Wallace's notes thereon. See also Harding *v.* Tifft, 75 N. Y., 461, before cited.

The Vermont court held, A. D. 1829, that "if neither party elect, the law will make the application, which requires that the debts which have the most precarious security should be first extinguished. The court are bound to carry into effect the object of the law; that is, *so to apply the payment that the creditor may obtain satisfaction* for his debt. The application of these principles must be plain and easy" (Briggs *v.* Williams, 2 Vermont, 286, bottom). Instead of making the application in the order of time, "if the plaintiff's claim consists of separate debts, part of which are secured and part not, the application will be made upon those that are not secured." (Langdon *v.* Brown (A. D. 1874), 46 Vermont, 515, bottom, per Pierpont, Ch. J.; King *v.* Andrews, 30 Ind., 429, 430, bottom.)

Under the Georgia code, it is left *to the jury* to determine what is an equitable application (McLendon *v.* Frost, 57 Ga., 448, 449); but, ordinarily, it is a question of law for the court, and it is erroneous to leave it to the jury. (Nutall *v.* Brannin, 5 Bush, 12, 19.)

Hence, the method adopted in the court below is reviewable here.

"If no application was made, either by the treasurer or by the officers of the commonwealth, then the law applied it as was *most advantageous for the State;* that is, to the payment of the indebtedness for which the county was not liable." (County of Schuylkill *v.* Commonwealth, 36 Penn. St., 524, 537, per Strong, J.)

The indebtment of Hough, as collector, in excess of

his bond, to wit, for $43,811.40, was his several indebtedness, for which no surety was holden.

The court in Maine, recognizing the doctrine that the application by it must be such as is most beneficial to the creditor, observed: "When a payment is made by one who is under a *several* and also under a *joint* liability to the same party, *and the money is not shown to have been derived from the fund from which the joint liability was to be met*, the law applies it to discharge the *several* liability, as being the appropriation most favorable to the creditor. In this case there was no proof from what source Sprague obtained the money. And it was rightfully left to the jury, if they should find a several liability against him, to apply the money to that liability, unless shown by the evidence that a different appropriation was intended." (Livermore *v.* Claridge, 33 Maine, 428, 429, top, per Shepley, C. J.)

That our courts do not follow the Roman law, see, in addition to the before-mentioned cases, Moss *v.* Adams (4 Iredell, Eq., 50, per Ruffin, C. J.); and I will also add a liberal quotation from the opinion of Gibson, C. J., in Logan *v.* Mason (6 Watts & S., 9, referred to in 1 Am. Leading Cases, *ubi sup.*):

"GIBSON, C. J.:

"If anything has been settled by decision, it is that the right to apply a payment without restriction as to anything but the time devolves on the creditor in default of application by the debtor; and I feel myself so bound by it that were I ever so well convinced of the superior excellence of the civil law I could not adopt it. I know not how an English or an American judge can strip an adopted rule of its common-law emendations merely because they were originally no part of it. It has become the law of his court, not by virtue of any inherent obligation in it, but by the force of precedent; and the same force that was competent to adopt it was equally competent to establish the parts that were added to it. If the courts were to discard them now, the law of contracts, of testaments, of donations *causa mortis*, of

guardian and ward, and, in short, of the whole mass of movable property, would be thrown into hopeless confusion by it, followed by instability of decision—the worst curse that can befall a people.

"Notwithstanding the admitted excellence of the Latin code, the English judges were constrained to alter almost every part of it which they introduced into the body of the common law in order to fit it to modern use; and the continental states who profess to have received it entire followed, only to a less extent, the footsteps of their more commercial neighbors. These alterations were indispensable to make the jurisprudence of the day keep pace with the changes wrought in the affairs of men by the lapse of a thousand years. Yet, encouraged by an article in the Lawyer's Magazine (No. 1, Art. 2), and by the authority of Mr. Justice Story in Goss *v.* Stinson (3 Sumner, 110), the district court have disregarded an actual application by the creditor in due season, though there had been no application by the debtor. For everything that comes from Mr. Justice Story I feel a deferential respect; and had not the weight of his name been thrown into the scale I should not have felt myself called upon to vindicate the rule of the common law. But in saying that, as regards the applications of payments, the Roman law is more rational and consonant to the presumed intention of the parties than the common law; that it is equally simple and convenient; and that it is, or ought to be, the law of the subject in this country, it seems to me his partiality for his favorite code had carried him too far. In the American courts the question is not an open one; and it would require some intolerable mischief—certainly more than an equality of simplicity, convenience, and reasonableness—to justify us in overturning the decisions of more than two centuries. Were we called on to engraft a new principle on the common-law stock, without lopping a branch to make room for it, I would certainly do as Lord Mansfield did in laying the foundations of the English commercial law; I would take it from what he, perhaps justly, called the first collection of written rea-

son that ever existed. Its fault, if it has one, is in aiming to do too much by attempting to give effect to abstract equities, which are too subtile to be dealt with by a human tribunal; at least by one encumbered by a jury. There is, however, no such equity in the case before us.

"It is agreed that the application of a payment belongs to the debtor in the first instance, and that in default of application by him, it devolves on the creditor. So far the Roman law and the common law march together. But the Roman law has this extraordinary proviso, that the creditor make the application as he would make it if he were the debtor; and any other application by him would go for nothing, on the ground that his act is consonant to the presumptive wish of the parties only, when it is most beneficial to him who paid. It is scarce necessary to say how unfounded is such a presumption in experience, which is the mother of presumptions. It is certainly a narrow basis for a moral duty. Why should the creditor, standing in no relation of confidence, be expected to take care of the interest of a party who is too supine or indifferent to take care of it himself. Conscience has nothing to do with such a case, for the man who will not exercise his right at the proper time, renounces it. This principle is the foundation of many of our titles. * * * A right of choice is essentially exclusive; and if the creditor's right of application is to be controlled by the right of the debtor, it is no right at all. The exercise of the power devolves upon the creditor either as a right or as a duty. If it is a right, it is absurd to say he may exercise it, but only in subordination to the right of another. Yet the Roman law says so, and tacitly admits that its proviso is repugnant to its rule. The writer who champions it in the magazine goes further, and admits that the proviso seems to be expressed in mockery of the creditor. If, however, the power devolved on the creditor subject to the duty to make the application in a particular way, he might be compelled to exercise it.

"But why compel him to go through the form of an

application, which the law would make without his assistance? That would be a mockery, indeed. The well-founded remark of the chancellor of New York, in Stone *v.* Seymour, 15 Wend., 29, shows clearly the want of a moral obligation in this matter, which the Roman law would enforce as a moral duty. As a rule of morals, the golden precept, to do as we would be done by, ought to bind the debtor as it binds the creditor; yet it is not assumed by that law that the debtor, when he makes the application, is bound to consult the interest of the creditor, though it is a maxim of our law that equality is equity. * * * The rule of the common law seems better founded in both reason and convenience. Its facility of application is a great and an original praise. Who can tell how a debtor would have his payment applied? Not the debtor himself, *if his interest were so balanced as to make him indifferent to the event* [as was the case here]; and if it were not, he would take care to give the proper direction at the proper time. How can the creditor decide for him if he could not or would not decide for himself? He might call on the debtor for instructions; but then the application might happen not to be the act of the creditor, except as the debtor's puppet; and the creditor's privilege would thus be deceptive. Though he should have acted in good faith, yet if the judge should think that he had erred in his belief that the particular application was the best thing that could be done for the debtor, it would go for nothing. It is plain, therefore, that the right of application held out to the creditor by the Roman law is illusive. It is a solecism to call it a right if it is not an independent one. And when the judge would come to correct the creditor's error he would be bewildered with the same distracting considerations that misled the creditor in the first instance, and that would have led to the conflict of decision in the English and American courts, complained of by the writer, where there was no actual application by either party." (Logan *v.* Mason, 6 Watts and Serg., 10–12, 13–14.)

In their notes upon this subject, Messrs. Hare and Wallace say that Chief Justice Gibson conceded too much to the admirers of the civil law in saying that the application [by the creditor] ought to be simultaneous with the reception and part of the res gestæ of payment. "The views *as to time* expressed in that case [Logan *v.* Mason], it is believed, go upon a wrong principle, and are not sound." 1 Am. Lead'g Cas., 4th ed., 283, top.

See the numerous cases, upon that point, hereinbefore cited.

Hare and Wallace, in their fourth edition, express much satisfaction in referring to the able opinion of Ruffin, C. J., in Moss *v.* Adams, 4 Ired. Eq., 42, upon this subject, which case was published after the early editions of their collection of American Leading Cases. 1 Am. Lead. Cas., 295.

Among various contributions to magazines upon this subject, I will only refer to one from the London Law Magazine for August, 1855, p. 21, republished in 3 Am. Law Reg., Old Ser., for October, 1855, p. 705, before mentioned in another connection.

Even if the common law followed the rule of the civil law, in making that application most beneficial to the debtor, it would not affect this case; since it does not at all appear that Hough himself is in the least benefited by having this $6,434.75 applied to the stamp account. His *sureties* are relieved; but it cannot, in law, make any difference whether he owes them, for what they have paid, or the government for the unpaid amount. In a case in Massachusetts, in 1823, it was contended "that if one of the debts is guaranteed and the other not, the application shall be made so as first to relieve the surety;" to which the court replied, "but we have not heard or seen any authority which makes out this point satisfactorily." (Brewer *v.* Knapp, 1 Pick., 332, 337, where the application was to the unsecured debt. See also Allen *v.* Kimball, 23 Pick., 473, 475, and the other cases hereinbefore mentioned.)

Not to keep his stamp account as required by law was an improper and unfaithful discharge by Hough of that

duty which these very sureties had undertaken should be well and faithfully performed. They cannot be said to have any equity to entitle them to have the court change the appropriation made of this money by the First Comptroller.

If the court makes the appropriation it must not impute laches to the agents of the government, but must make that application which a proper discharge of duty required at the hands of the Treasury officials.

In the present case, however, the court did not assume to make an appropriation of this $6,434.75, which we are now considering. It allowed the debtor, months and years after the payments were made, to divide up the ascertained balance of his disbursing account, and to appropriate just so many dollars and cents as he pleased to the cancellation of his stamp account, for the purpose of defrauding the government of just that sum by the operation. (Record, 42, bottom; *ante*, 10, top.) No authority can be found to justify the course here adopted.

IV.

The first instruction of the judge confined the attention of the jury exclusively to the amount of stamps delivered Mr. Hough *prior* to June 30, 1864; discharging the defendants from all liability for stamps subsequently delivered. (Record, 42; folio 151; *ante*, p. 9.)

This was in direct opposition to the request of the district attorney, who asked to have the jury instructed that the sureties were liable for all stamps, &c., proved to have gone into Hough's hands, "*both before* and *since* the execution of the bond, unless the same had been properly accounted for by said Hough." (Record, 41, bottom; 42, top; *ante*, p. 8, lower half.)

This instruction was refused, and instead thereof, "The court instruct the jury that the bond sued upon creates no liability against defendants for any stamps received by Hough, as stamp agent, *subsequent* to 30th

June, 1864, and that the account of Hough, exhibited by the plaintiffs in evidence, is to be examined by them to ascertain what debts exist *prior* to June 30, 1864." (Record, 42; folio 151; *ante*, p. 9, middle.)

The bond is dated September 16, 1864—two and a half months after the approval of the act of June 30, 1864—which last-mentioned date is assumed by the judge as terminating the responsibility of these sureties!

The ground for the position taken by the court below is supposed to be found in the recitals which precede the obligatory clause of the condition, which state Hough's appointment as collector; that the act of March 3, 1863, §16, authorizes the Commissioner of Internal Revenue to deliver stamps to any collector; and that "the Commissioner of Internal Revenue hath, *pursuant to the provisions of said section*, delivered to the said Ruel Hough, collector as aforesaid, a suitable quantity of said stamped vellum, parchment, or paper, and adhesive stamps."

These recitals make no specific mention of the act of June 30, 1864, possibly because the bureau was using up the old stock of blank bonds, printed before that act was passed; but much more probably, as hereafter noticed, in order to make the fact appear that Mr. Hough still had on hand stamps supplied to him under prior legislation; but the condition immediately following declares: "Now, therefore, if the said Ruel Hough shall make a faithful return whenever so required of the moneys received by him for such stamped vellum, parchment, or paper, and adhesive stamps, as have been, *or may hereafter be*, delivered to him, and of all quantities or amounts thereof undisposed of," &c., &c., then the above obligation to be void, &c. (Record, 19.)

The great purpose for which courts are instituted and juries are impaneled in civil cases is to ascertain and to carry out (so far as may be) the real intention of the parties litigant, in relation to the subject-matter of such litigation. For this purpose also and only, construction is necessarily had of written instruments wherever they are the ground of legal controversy.

The *intention* of the parties to the instrument is the problem to be solved.

"There are many cases on the construction of bonds," observes Marshall, C. J., "in which the letter of the condition has been departed from to carry into effect the intention of the parties." (Cooke *v.* Graham, 3 Cranch, 229, 335.)

Here, no departure from the letter is required to give the bond due effect. It is only by disregarding the words ("or may hereafter be") italicized by me in the above quotation of the condition of the bond, that the ruling of the court now under consideration can be sustained.

"*The whole language of the condition* is to be considered in ascertaining the true construction of different parts of it." (Parker, C. J., in N. H. Bank *v.* Willard, 10 N. H., 210, 213, bottom.)

"TINDAL, C. J.: The only question for us to determine is, What is the meaning of the condition of the bond?" (Inglesby *v.* Swift, 10 Bing., 87. Parker *v.* Wise, 6 M & S., 239, 245, *et seq.*, where are found separate opinions by Ellenborough, C. J., Abbott and Holroyd, JJ.; Evans *v.* Earle, 10 Exchq., 1; Edwards *v.* Brown, 3 Young. & Jer., *423, *428, *et seq.*; Iredell *v.* Barbee, 9 Ired., Law, 250, 253.)

Where the bond is not one between individuals, given to secure the performance of a private engagement, but is for the faithful discharge of a public duty, reference may be had to the statutes imposing and defining the duty, to determine the extent of the obligation assumed. The terms of the law become part of the "surrounding circumstances," which may always be referred to in construing a contract.

In New Hampshire, thirty years ago, the obligors endeavored to have the general language of their bond limited by a special recital; but the court replied, "However forcible this argument might be in some cases, these are, after all, but rules of construction, which experience has shown usually to lead to right results, but which are binding on us, not conclusively, but only so far as,

on comparison with other rules, they seem to lead to reasonable conclusions. We are bound to look at the surrounding circumstances, and to weigh them in coming to a conclusion. In this supreme court of probate, we know on what occasions the judge of probate is authorized to take official bonds. We take judicial notice of them. * * * *We notice the kind of bond the law authorizes the judge to receive and requires him to exact.* Thus we know *what the parties must have intended*, much better than by any general rules of construction; and we are bound to give to the language used such construction as will give effect to the intention of the law, and of the [probate] court, and of the parties concerned, if it can be done consistently with the language used, however unskillfully the instrument may be drawn, and though some of the expressions used might even be understood to import a different meaning, if they were to be construed merely by the ordinary rules of interpretation, and without that same light which the statutes afford us as to the intention of the parties and of the probate court." (Judge of Probate *v.* Ordway, 23 N. H., being 3 Foster, 198, 206, per Bell, J.—perhaps the ablest judge then on that bench.)

In North Carolina, June, 1820, "Taylor, chief justice, after stating the case, proceeded to deliver the opinion of the court: The act of the assembly does not prescribe the form of the condition of the bond, but the obvious design of it was to provide for the payment of the sum stayed and all costs upon the dissolution of the injunction. *Any condition*, therefore, *which, by a reasonable construction, stipulates for that object, ought to be supported.*" (Gully *v.* Gully, 1 Hawks, 20, 23.)

"Where a contract is made with the government, it is, in contemplation of law, made at the place where its principal powers are to be exercised. 7 Pet. 449; 6 *Id.*, 172. And where a security is given in pursuance of a decree of a court of justice, it is to be construed *according to the intention of the tribunal which directed its execution*, and is in contemplation of law to be performed at the place where the court exercises its jurisdiction." (Irvine *v.* Barrett, 2 Grant's Cas., 74.)

"It is fair to presume that such was the design of the parties (to be responsible to the extent the law required), however clumsily it may have been expressed by the officer who prepared the bond." Per Tucker, P., in White *v.* Clay, 7 Leigh, 80; as cited and approved in Clayton *v.* Anthony, 15 Grattan, 525, near top.

Nor does it make any difference that sureties are concerned in this question. They are original parties to the undertaking to be construed. Principal and sureties, each and all contract for precisely the same thing, in the same terms and sentence. The liability of each and all for failure to observe those terms is identical.

"There is no distinction in this respect between the principal and the sureties. Alanson Seaver had engaged to do certain things; and for not doing them he was liable. The sureties engaged that he should do them; and for his not doing them, they become liable. So that the same act, or neglect, that charges the principal must charge the sureties." (Seaver *v.* Young, 16 Vermont, 662; United States *v.* Cushman, 2 Sumner, 436; Berg *v.* Radcliff, 6 Johns. Ch., 302; Shaw *v.* McFarlane, 1 Ired., Law, 216; Hobbs *v.* Middleton, 1 J. J. Marsh, 176.)

"Though the rule of strict construction in favor of a surety excludes *implied* engagements and calls for exact performance of express stipulations, it has no application to the construction of the written undertaking. In this respect there is no difference between the contract of a surety and that of any other party. The instrument in this case by which the parties became bound is to be construed, no less as to the surety than as to the principal, with reference to the situation of the parties, and the hazards against which the plaintiff exacted security as a condition to introducing an employee into the bank." (Rochester City Bank *v.* Elwood, 21 N. Y., 88, 90, top.)

That this bond is to receive a reasonable interpretation, and to be construed strongly against the party executing it, see Mason *v.* Pritchard, 12 East, 227, and the other cases cited *infra*, under the next division of this brief. (*Post*, p. 43, *et seq.*, division V, and p. 47.)

Let us look for a moment at the legislation affecting this case. The act of July 1, 1862, c. 119, § 102 (12 Stats., 477–8), authorized the Commissioner of Internal Revenue to sell to and supply collectors and others with stamps, &c., "upon payment, *at the time of delivery*, of the amount of duties said stamps, &c., represent," and allowed a commission to all purchasers of not less than $50 worth at one time. Neither that section nor the law contained any provision for the delivery of stamps to *anybody* upon credit.

The act of March 3, 1863, c. 74, § 16 (12 Stats., 724), enables the Commissioner of Internal Revenue, in any collection district in which, in his judgment, the facilities for procuring stamps are insufficient, "to furnish, supply, and deliver to the collector of any such district a suitable quantity or amount of stamped vellum, parchment, or paper, and adhesive stamps, without prepayment therefor, and shall allow the highest rate of commissions to the collector allowed by law to any other persons purchasing the same, and may, in advance, require of any such collector a bond, with sufficient sureties, to an amount equal to the value of any stamped vellum, parchment, or paper, and adhesive stamps which may be placed in his hands and remain unaccounted for, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment, monthly, of all quantities or amounts sold or not remaining on hand." (12 Stats., 724.)

This is the section specially referred to in the bond in suit.

The act of June 30, 1864, c. 173, in sec. 161 (13 Stats., 294), re-enacted section 102 of the act of July 1, 1862, above mentioned, authorizing the sale and supply of stamps to collectors and others upon payment therefor at the time of delivery, while section 170 of the act of June 30, 1864, is an exact reproduction of the last-quoted section (section 16) of the amendatory act of March 3, 1863, chapter 74.

The true construction of the bond, in view of these statutes, is clear.

Mr. Hough, on June 30, 1864, and thereafterwards, to the date of his bond, September 16, 1864, had on hand unsold stamps delivered to him under section 16 of the act of March 3, 1863. He was expecting to be further supplied with stamps, from time to time, under section 170 of the act of June 30, 1864. To preclude the idea that the liability of himself and sureties under this bond was to be restricted to stamps delivered under the law then in force (act of June 30, 1864, § 170), the fact is recited that stamps had been delivered under prior legislation for which he is still to account. Those that "have been" supplied were furnished under the act of March 3, 1863, section 16; those that "may hereafter be delivered" would come under act of June 30, 1864, section 170; and he and his sureties were equally bound for both.

By looking at the stamps or pieces of vellum, &c., themselves, it would be impossible to tell under which act he received them; therefore, to save any confusion, question, or perjury on this point, this bond of September 16, 1864, is made to cover all the stamps Hough has on hand at the day of its date, as well as those to be subsequently delivered.

That a portion of them might have been secured by a bond given under the act of March 3, 1863, § 16, would not affect the liability to the government of the signers of this or the former bond. (Pendleton *v.* Bank of Kentucky, 1 Munroe, 171, 177–8; Tennessee Hosp. *v.* Fuqua, 1 Lea, 608; McGlothlin *v.* Wyatt, *Id.*, 717; U. S. *v.* Nicholl, 12 Wheat., 505.)

Judge Trigg, however, does not release these sureties from liability for stamps for which such prior bond was given. He holds them for these, and discharges them as to those for which there is (under his construction) no security!!

He is presumed to have done it upon the ground that the condition is restrained to the very section named in the recital.

A recital of the duration of the principal's tenure of office, for his good behavior in which the sureties are holden, has been held to restrict the general language of

the condition that he shall "*at all times*" behave himself faithfully and well, so that it shall mean "all times" during the term named; but this has never been applied to anything but the *time* for which the bond is security.

Upon this point, referring to the class of cases mentioned, Ellenborough, C. J., said (I quote the entire opinion), in Sanson *v.* Bell: "I fully accede to these cases. They apply to the *time* for which sureties shall be liable, and where this is definitely marked out in the recital of the condition it is not to be extended by any subsequent general words. Here, had the condition only referred to the acceptances mentioned in the recital, I should have thought the defendant liable for one set of bills accepted by the plaintiffs on account of W. Bell, and no more. But a new subject-matter is afterwards introduced, and the guaranty is extended to *any other account thereafter to subsist between them* [originally italicized] without any limitation of time, or restriction as to the nature of the transaction. An expanded liability is thus created. The inquiry must be taken for all such sums, to the amount of £10,000, as the plaintiffs can show to be on any account due to them from W. Bell." (2 Campbell, 39, 41.)

V.

If the positions heretofore taken as to the appropriation of payments and the true construction of the bond are correct, it follows that the instruction requested by the district attorney, "that the plaintiffs are entitled to recover the amount shown to be due the United States by the account read in evidence with 6 per cent. interest on said amount from June 30, 1869" (Record, 42, top; *ante*, p. 8, bottom), should have been given.

Mr. Hough says he vacated his office November 6, 1866. (Record, 38; folio 136; *ante*, p. 5, near top..) He made some payments, duly credited, subsequently. His last payment, about which there is something to be said hereafter, was $10,000 credited January 25, 1867. (Rec-

ord 26; last item in column headed "Date of remittance" and "Amount deposited.") At the foot of the column "Date of remittance," under date of May 22, 1867, is a memorandum and credit of "Stamps turned over to H. F. Cooper," his successor in office. (*Ibid.*) The account is adjusted, and the balance now claimed stated, June 30, 1869. (Record, 23; folio 76.) It is evident that the stamps in his possession having been turned over and credited more than two years before, the balance due from him was a cash balance for moneys actually received by him from the sale of stamps supplied to him by the government. His failure to pay over that balance entitled the United States to interest at least from June 30, 1869, if from no earlier day.

"Whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay." (People *v.* New York, 5 Cowen, 331, cited as a correct and terse statement of the law in Swett *v.* Hooper, 62 Maine, 55, bottom.)

This money was clearly due before June 30, 1869, and the account was then stated. Not to pay it on or before that day was a default, constituting a breach of the bond in suit. The *least* damages that can legally be awarded for such a breach is legal interest upon the sum unlawfully detained, during the whole period of such detention. (Wood *v.* Robbins, 11 Mass, 506; Dodge *v.* Perkins, 9 Pick., 368; Bassett *v.* Sanborn, 9 Cush., 68; Gay *v.* Gardiner, 54 Maine, 477; Farmington *v.* Stanley, 60 Maine, 476; Buzzell *v.* Snell, 25 N. H. (5 Foster), 474; Nat. Lancers *v.* Lovering, 30 N. H., 511; Whitworth *v.* Hart, 22 Ala., 343, citing earlier cases in that State; Lynch *v.* De Viar, 8 Johns., 310; Clark *v.* Barlow, 4 Johns., 183; Williams *v.* Sherman, 7 Wend., 109, 112; Greenly *v.* Hopkins, 10 Wend., 96; Still *v.* Hunt, 20 Wend., 51; Van Rensselaer *v.* Jewett, 2 N. Y. (Comst.), 140; Adams *v.* Fort Plain Bk., 36 N. Y., 261; Stacy *v.* Graham, 14 N. Y., 494; Stevenson *v.* Maxwell, 2 Sandf. Ch., 273; Honore *v.* Murray, 3 Dana, 31; Elkin *v.* Moore, 6 B. Monr., 462; Sims *v.* Goudelock, 7 Richd.,

23; Kennedy *v.* Barnwell, *Ib.*, 124; Barr *v.* Hazleton, 10 Richd. Eq., 61, 62; Vt. & C. R. R. *v.* Vt. Central R. R., 34 Vt., 65; Cooper *v.* Rainey, 4 Minn., 532; Rapaile *v.* Emory, 1 Dallas, 349; Shipman *v.* Miller, 2 Root, 405; Evans *v.* State, 36 Texas, 323; Youmans *v.* Heartt, 34 Mich. 401.)

As to Mr. Hough himself, by the statutes below printed, he was required to pay and account for stamps monthly prior to March 3, 1865, and daily, for all sold after that date. His neglect to do this was a breach of his duty and bond for which his sureties are liable.

The act of June 30, 1864, chap. 173, § 33, reads:

"SEC. 33. *And be it further enacted*, That the several collectors shall, at the expiration of each and every month after they shall respectively commence their collections, transmit to the Commissioner of Internal Revenue a statement of the collections made by them, respectively, within the month, and pay over monthly, or at such time or times as may be required by the Commissioner of Internal Revenue, the moneys by them respectively collected within the said term and at such places as may be designated and required by the Commissioner of Internal Revenue; and each of the said collectors shall complete the collection of all sums assigned to him for collection, as aforesaid, shall pay over the same into the Treasury, and shall render his accounts to the Treasury Department as often as he may be required. And the Secretary of the Treasury is authorized to designate one or more depositories in each State for the deposit and safe-keeping of the moneys collected by virtue of this act; and the receipt of the proper officer of such depository to a collector for the money deposited by him shall be a sufficient voucher for such collector in the settlement of his accounts at the Treasury Department. And the Commissioner of Internal Revenue may, under the direction of the Secretary of the Treasury, prescribe such regulations with reference to such deposits as he may deem necessary." (13 Stats., 236.)

The act of March 3, 1865, c. 78, § 3, required collect-

ors, &c., to pay in their collections to a designated depositary or United States treasurer, daily. (*Id.*, 483.)

Revised Statutes, sec. 3624, provides: "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum from the time of receiving the money until the time when it shall be repaid into the Treasury."

Independently of Revised Statutes, sec. 3624, the parties to this bond are legally liable for interest after default.

That section expressly makes them liable for interest from an earlier date (*i. e.*, the reception of the money) where, as here, the sum is reported due and remains unpaid.

There is no reason why the State should not be entitled to the same privileges as its citizens with relation to the right of receiving interest on debts due it. (State *v.* Sullivan, 12 La. Ann., 720.)

The right of the government is the same as that of individuals. (U. S. *v.* Barker, 12 Wheaton, 559; U. S. *v.* Planters' Bank, 9 Wheaton, 904; U. S. *v.* Ames, 1 W. & M., 76; U. S. *v.* Bk. of Metropolis, 15 Peters, 377; the Floyd Acceptances, 7 Wallace, 678, *et seq.*; Gilbert *v.* U. S., 8 Wall., 361, 362; U. S. *v.* Un. Pa. R. R. Co., 98 U. S., 569; Farmington *v.* Stanley, 60 Maine, 476.)

The liability of the sureties is the same as that of Mr. Hough in regard to interest; at least, it is so after June 30, 1869.

The claim is not that interest is expressly given by the terms of the instrument; but that it follows, by implication of law, from the *breach* of it. (Brainard *v.*

Jones, 18 N. Y., 36, 37, where it is said that "sureties can claim no exemption from the rule.") See also Seaver *v.* Young (16 Vermont, 662), and other cases hereinbefore cited.

In this connection we may observe what is equally, if not more, applicable to the question of construing the instrument—that this bond is to receive a reasonable interpretation, and to be construed strongly against the party executing it. (Mason *v.* Pritchard, 12 East, 227; Mayer *v.* Isaac, 6 M. & W., 605; Hargreave *v.* Suree, 6 Bing., 249; Wood *v.* Priestner, L. R., 2 Ex., 66; N. H. Co. Bk. *v.* Mitchell, 15 Conn., 206; Lewis *v.* Dwight, 10 Conn., 95; State *v.* Sullivan, 12 La. Ann., 720.)

VI.

As to the next request of the district attorney, that, if Hough gave no direction as to the application of the balance of the disbursing account until 1871, the government would have the right to ignore that direction, apply the balance to the collector's account, and hold all the defendants for the deficiency upon the stamp account (Record, 42; *ante*, p. 9, top), it was obviously correct; but as I have gone over the whole ground, in considering his first request, and conclusively shown (as I think) that the debtor's right to direct the appropriation of a payment is always strictly limited to the very time and act of payment, so as to be part of the *res gestæ*, it is not worth while to discuss it further here.

VII.

The first instruction given by the court, confining the defendant's liability to stamps delivered *before* June 30, 1864, (Record, 42; folio 151; *ante*, p. 9, 9,) has been already considered in connection with the instruction asked and refused relating to the construction of the bond in this respect.

The next instruction excepted to is this: "Payments made on that account, and entered to the credit thereof, are to be applied to the debts in order of time, and if

they find there are credits on said account not derived from the sale of stamps *subsequent* to June 30, 1864, of sufficient amount to extinguish the items of debt *prior* to June 30, 1864, they will find for the defendants." (Record, 42; folio 151; *ante*, p. 9, middle.)

This was equivalent to directing a verdict for the defense, for a moment's computation of the items of account for stamps delivered prior to June 30, 1864, showed that these amounted to $18,864.20. (Record, 25; account, including item under date of June 9, 1864.) The credits, including $500 commissions, to June 9, 1864, were $11,291.21. (*Ib.*) So that the balance due June 30, 1864, on stamps previously supplied was $7,572.99 if commissions be allowed, and $8,072.99 if commissions be not allowed. If the before-mentioned credit of January 25, 1867, for $10,000 (Record, 26; last item of "Amount deposited") was applied as directed it would more than extinguish all the judge told the jury was covered by this bond. He completes the instruction we are now considering by saying: "As to the last credit there of $10,000, if they shall find that it was brought from the general collector's account, and did not grow out of stamps, it should be applied to the oldest debt item in the account; and if they find it sufficient to extinguish the items *older* than June 30, 1864, they will find for the defendants." (Record, 42; folio 152; *ante*, p. 9, middle.)

The error of which we have heretofore complained lies at the foundation of this instruction. It construes the bond not to cover any items of stamps furnished after June 30, 1864. This proposition need not be further discussed. But there is an additional error in this instruction. There was due the United States upon Hough's account as *collector*, September 20, 1871, the sum of $143,000. (Record, 41; folio 147.) This was the last adjustment, years after he went out of office. While in office required to deposit monthly or daily, it would frequently happen that sums collected under special assessments would be deposited and credited before the assessments which produced them reached the treasury to be charged to the collector, and there would be an

apparent balance in his favor, while the real balance was the other way. By September 20, 1871, the account was correctly stated, and he had owed $143,000 or more. If the $10,000 credit, then, "was brought from the general collector's account, and *did not grow out of stamps*," there was no propriety in applying it to *any* item of the stamp account. It should have been remanded to the general collector's account, from which it was taken, and would have left $10,000 more (or $16,093.78) due on his stamp account. A payment which is general, or the source of which is unknown, may be appropriated at the receiver's option, but if shown to have lawfully belonged to the collector's account, it should not be considered in the stamp account. (U. S. *v.* January, 7 Cranch, 572, and cases next below cited.) Nor can the United States be prejudiced by the erroneous entry of that credit upon the stamp account.

The sureties upon Hough's bond as collector have the right to have this $10,000 item remanded to his account as collector. (U. S. *v.* Eckford, 1 How., 261; Levystein *v.* Whitman, 59 Ala., 346, top; Williams *v.* Swab, 56 Miss., 338; Suter *v.* Ives, 47 Md., 521; *ante*, pp. 3, 4.)

It is useless to dwell upon this, however, as I deem the instruction clearly wrong in confining the operation of the bond to securing pay for stamps delivered prior to June 30, 1864.

VIII.

The first branch of the instruction given at the defendant's request was that Hough had the legal right up to 1868 to appropriate the amount of $6,434.75 allowed him for salary, commissions, and expenses on June 30, 1866, and placed to his credit as disbursing agent; and if the jury should find that, in 1866 or 1867, he did direct its application to the stamp account, and it was enough to settle the stamp account, their verdict should be for the defendants. (Record, 42; folio 152; *ante*, pp. 9, 10.)

Hough ceased to be collector November 6, 1866. (Record, 38; folio 136; *ante*, p. 5, near top.) All salary,

commissions, and expenses pertaining to that office must have accrued prior to that date. Upon what theory of law he was entitled to have the time up to the year 1868 to determine how the balance derived from this source should be applied, I am at a loss to conceive. I have searched the record in vain to learn what particular bearing the year 1868 has on this case, or why it was brought into the charge to the jury.

If right in the claim that the debtor's right of appropriation is confined to the very time of payment, this branch of the instruction need be no further considered. I am content to leave it upon what has been already said.

IX.

The last part of the last instruction given (Record, 42, bottom) directs the jury if they find the disbursing-account balance was not appropriated by Hough nor the government *before* September, 1871, then it is the duty of the court to apply it, and the court directs the jury to apply it to the stamp account, and if it is enough to pay the balance due on that account, they will find for the defendants. (Record, 42, bottom; *ante*, p. 10, top.)

The first part of this instruction gives Hough until 1868 to appropriate. The next denies the government that right unless exercised *before* September, 1871. It was formally exercised upon the Treasury Department books in that month. (Record, 40; folios 143-144; *ante*, p. 7.) It had been directed May 4, 1871 (Record, 37; folio 132; *ante*, p. 4, bottom), before the correspondence on that subject commenced. The creditor's right has been already discussed *in extenso*. Nothing more need be added here. I will only revert the attention of the court to the cases saying that the application of payments may be to notes which, but for that application, would be barred by the statute of limitations, if the notes were not barred at the date of payment. The creditor's right has never practically received the limitation imposed upon it in this case by Judge Trigg.

But had the duty devolved upon the court to direct the application of this balance, the direction given was legally incorrect, and that asked by the district attorney was right.

The application should have been to the collector's account, for the reasons hereinbefore given, to wit:

1. Because the salary, commissions, and expenses pertained to that office.

2. Because it was the account which was most precarious.

3. Because it was for the interest of the United States —the creditor.

The subject has been so fully presented in the preceding pages of this brief that it will not be reopened here.

EDWIN B. SMITH,
Assistant Attorney-General.

OFFICE SUPREME COURT U. S.
FILED
OCT 15 1880
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

No. 16.

UNITED STATES

vs.

RUIL HOUGH ET AL.

Brief of P. PHILLIPS & W. HALLETT PHILLIPS,

For Defendants in Error.

October 15, 1880.

R. O. Polkinhorn, Printer.

UNITED STATES SUPREME COURT.

No. 16.

UNITED STATES

vs.

RUIL HOUGH ET AL.

Brief of P. PHILLIPS & W. HALLETT PHILLIPS,

For Defendants in Error.

This action is brought on a bond executed by Hough and his sureties on 16 September, 1864. It recites that Hough had been appointed collector of internal revenue for the First District of Tennessee, and that *under the sixteenth section of the act of 1 July, 1862, approved 3 March, 1863*, the Commissioner of Internal Revenue had delivered to him a certain quantity of "adhesive stamps." The condition of the bond is, that Hough would, in reference thereto, do all acts required to be done, according to law.

The principal contention between the parties arises on the pleas that the Government was indebted to Hough for an amount larger than the demand on this bond. This is set forth in the fourth plea as arising out of the settlement of his account as collector and ex officio disbursing agent.

The fifth plea then avers that of the money so due, Hough

had, before the commencement of the suit, and while this sum of money stood to his credit as such collector or disbursing agent, and had not been otherwise applied, or sought to be applied, by the plaintiff, instructed the proper officers to appropriate a sufficiency of the same to the satisfaction of the debt sued for in this action. p. 6.

Fully to understand the case we refer the court to the acts of Congress.

The act of 1 July, 1862, in its first section, authorizes the President, "for the purpose of superintending the collection of internal revenues, stamp duties, licenses, &c., imposed by this act, or which may hereafter be imposed, and of assessing the same, to appoint a Commissioner of Internal Revenue.

The same section provides for a division of territory into collection districts, and the appointment of an assessor and collector for each district.

The fourth section requires from the collector the execution of a bond for such amount as may be prescribed by the Commissioner, with not less than five sureties, to be filed with the First Comptroller, conditioned to account for all public monies which may come to his hand.

The 33d section provides for his compensation a certain commission, not to exceed $10,000 in amount.

12 Stat., 432.

The act of 3 March, 1863, amendatory of the former act, in its 16th section authorizes the Commissioner to furnish to the collector of the district a suitable quantity of adhesive stamps without prepayment therefor, who *may*, in advance, require of such collector a bond with sufficient sureties to an amount equal to the value of any adhesive stamps, &c., which may be placed in his hands and remain unaccounted for conditioned for the faithful return, &c., the

collector to be allowed the highest rate of commissions allowed by law to any other parties purchasing the same.

12 Stat., 713.

The act 30 June, 1864, entitled an act "to provide internal revenue to support the Government, to pay interest on the public debt and for other purposes."

It contains 182 sections and covers the whole ground.

The 7th section continues in force the 2d section of the act of 1862.

The 9th provides for the collector's bond in very nearly the same terms required by the 4th section of the act of 1862.

The 25th section provides for a *salary, commissions and allowances to the collector.*

The 170th section authorizes the delivery of adhesive stamps, &c., to the collector, and provides for his commissions and the execution of a bond in the same terms as enacted in the 16th section of the act of 1863.

The 181st section appropriates $400,000 for expenses incident to carrying into effect the various acts connected with internal revenue; and it is made the duty of the collectors as the Secretary may direct to act as "disbursing agents to pay the aforesaid expenses *without increased compensation therefor,*" who shall give good and sufficient bonds for the faithful performance of their duties, the appropriation to continue in force until the 30th of June, 1865.

13 Stats., 223.

The 173d section repeals a large number of acts, among them the act of 1 July, 1862, *supra*, excepting the 115th and 119th sections, and all its provisions creating the office of commissioner, collector, &c., and relating to the appointment and qualification of said officers.

It also repeals the act 3 March, 1863, *supra*, excepting

those provisions which create the offices of deputy commissioner and cashier of internal duties and *revenue agents* and provide for the appointment and qualification of said officers.

The revenue agents here referred to are those mentioned in the 20th section of the act authorizing the Secretary to appoint "three revenue agents to aid in the prosecution and detection of frauds upon the revenue.

The 115th and 119th sections of the acts of 1862, saved in the repeal, have no relation to the matter in hand and need not be cited.

The present action was commenced on the 11th of May, 1875, but prior thereto, to wit, on the 26th of January, 1868, the same parties were sued on the same cause of action, in which there was a judgment for the defendants November, 1874.

The cause was tried on the 1st, 2d, 3d, 4th, 5th, and 6th pleas, on which issue was joined. The, last presenting the matter of the suit, commenced in 1868, which is now referred to as showing the commencement of this controversy.

The Bill of Exceptions.

This appears to have been made up by the clerk, and contrary to all rule it is stuffed with irrelevant matter. It commences at p. 19 and extends to p. 43; and on its face declares that it contains "*all the evidence in the cause.*"

The evidence offered by plaintiff was the bond sued on and Hough's account "with the United States Office of Internal Revenue." pp. 12, 25.

At p. 41 it is stated there was also read to the jury an

account, which showed that on 20 September, 1871—the date at which $15,453.63 was applied to Hough's account as collector—he was indebted to the United States $143,000. p. 41.

The defendants gave in evidence the following transcripts of accounts from the department.

1. One with Hough, collector from 1 July, 1865, to 30 June, 1866, for "salary, commissions and expenses, showing a balance due Hough of $6,434.75, and an order that the said balance be carried to the credit of the collector as *disbursing agent*, on the books of the Register of the Treasury." p. 35.

2. One with Hough, as collector, showing a balance due him 30 June, 1865, of $94,000.

3. One showing a balance due by the collector 30 June, 1866, of $11,000. In this account it is also shown that in this balance was included charges of tax-lists for future collections, largely exceeding $11,000 in amount.

4. One showing an account with Hough, as collector, made up to 31 October, 1866, in which there is deducted, for credits allowed to the collector, an item thus—*stamps, $10,000*—leaving the credits less by the amount of $10,000.

5. One showing that on 20 September, 1871, there was credited to the collector, and covered into the Treasury, the sum of $15,453.63, which, before that time, had stood on the books of the Treasury to the credit of Hough, as *disbursing agent*, and that this amount embraced the amount of $6,434.75, placed to his credit as disbursing agent, in the account stated up to 30 June, 1866, for salary, commissions, and expenses. p. 41.

Defendants also offered in evidence the correspondence with the department as fixing the time the Government had appropriated the credit of $6,434.75, and the deposi-

tion of Hough, which had been taken and used in the trial of the first suit, noted as No. 759.

This correspondence and deposition were objected to, on the ground that they were *incompetent and irrelevant.*" The objection was overruled and the plaintiff excepted.

In the correspondence above referred to is the letter of the First Comptroller, dated 31 May, 1871, addressed to the attorney of Hough, in which he says: "In reply to your inquiry asking on what date the sum due R. Hough was actually placed to his credit on his account as collector, I have to state that the Solicitor of the Treasury, under date of *May 4, instant*, gave the necessary instructions to the United States District Attorney at Memphis, under which the amount referred to is to be allowed as a partial off-set to the balance due from Mr. Hough on his revenue account." p. 37.

Hough, in his deposition, testifies that, in 1867, being notified by the District Attorney that suit was ordered, he wrote to the Department, under cover of the usual printed envelopes furnished by it, directing the balance in his favor (heretofore referred to) to be applied to the stamp account, and that he had made the same request verbally to the District Attorney himself. p. 38.

More than this—it is shown that Hough, by his attorney, on 16 May, 1871, directed, in the most formal manner, the application of the credit to the stamp account. p. 36.

While it may be true the Comptroller instructed the District Attorney on 4 May that the credit was to be allowed on another account, the transcript of the Department given in evidence shows that, in fact, the appropriation to the collector's account was not made until 20 September, 1871, when this balance to his credit was covered into the Treasury.

This is the case on which the District Attorney presented a series of instructions to be given to the jury. The bill of exceptions thus refers to them: "Which instructions the court refused to give, and the District Attorney excepted, but charged the jury as follows."

The charge is then set forth, and the bill thus concludes:

The District Attorney moved the court for a new trial, which motion was overruled by the court, to all of which the District Attorney excepted, and tenders this, his bill of exceptions, and asks that it may be signed and sealed, and made a part of the record in this cause, which is accordingly done.

(Signed) CONALLEY F. TRIGG,
Dist. Judge.

How will the court consider this bill of exceptions?

As heretofore stated, it sets forth in extenso all the evidence in the cause, contrary to the repeated condemnation of this court. It is not for us to say how long the court will content itself in reiterating this condemnation without imposing a penalty for a violation of its rule.

We pass, however, to a criticism of a much more serious character. In the first place, it does not appear that the charges given by the court were excepted to, while the jury was at the bar. If we are right in our construction of the bill, this is fatal under the repeated adjudications of the court.

Suppose, however, we are wrong in our construction, then we present the objection that the charges asked by the plaintiff and refused, as well as those given by the court, are excepted to in gross; and, under such a condition, the judgment cannot be reversed, if any one charge given is sustainable.

In *Johnson* vs. *Jones*, Mr. Justice SWAYNE lays down the rule as well settled, "that if a series of propositions be embodied in instructions, and they are excepted to in mass, if any one of the propositions be correct, the exception must be overruled." For this he cites the decisions of the New York courts.

1 Bl., 220.

In *Rogers* vs *The Marshal*, decided in 1863, three instructions were given to the jury. The bill, after reciting the charge, proceeded as follows:

"To which said instructions and charge to the jury, the plaintiff, then and there, in open court, did except *according to the course of practice of this court*."

The objection to the bill was here raised, and an attempt was made to meet it by the argument that the words "according to the course of practice of this court" were equivalent to saying that the party excepted to "each of the several matters he laid in said charge." This attempt, though ingenious, received no consideration.

Mr. Justice DAVIS, in delivering the opinion, said: "It is insisted that if the court was right in one proposition, *it erred in submitting others to the jury*."

This is true; but the plaintiffs in error cannot avail themselves of their exception, which was *general and not specific*, citing the exact language used by Mr. Justice SWAYNE in in *Johnston* vs. *Jones*, *supra*.

1 Wall., 654.

In *Harvey* vs. *Tyler*, Mr. Justice MILLER said: "It is a fair inference from the bill of exceptions that each of the three series of exceptions refused was prayed and excepted to as a whole. If so, the proceeding was not only a clear violation of the rule of this court, but if any proposition in

the series ought to have been rejected, then the court did not err in refusing the prayer."

2 Wall., 338.

In *Lincoln* vs. *Claffin* (1868), the action was case for obtaining goods on false pretences. The court, after giving instructions as to fraud, told the jury if they found for plaintiff, their verdict should be for the value of the goods with *interest* from the time of purchase.

The charge was excepted to *generally*, and it was urged here by plaintiff in error that, in such an action, interest was not allowed *eo nominee*, but is a matter of discretion with the jury.

In affirming the judgment, Mr. Justice FIELD said: "It is possible the court erred. In cases of *tort* the allowance of interest or damages rests in the discretion of the jury. But the error, if it be one, cannot be taken advantage of, for no exception was taken to the charge on that ground. The charge embraces *several distinct propositions*, and a *general exception in such case cannot avail the party if any one of them is correct.*"

7 Wall., 139.

In *Beaver* vs. *Taylor*, decided as late as 1876, Mr. Justice HUNT, delivering the opinion affirming the judgment in an action of ejectment, states the same rule thus:

"If the entire series of propositions was presented as *one request*, and if any one proposition was unsound, *an exception to the refusal to charge the series cannot be maintained.*

"If the entire charge of the court is *excepted to in gross*, and *any portion thus excepted to is sound*, the exception cannot be sustained."

93 U. S., 54.

With the rule thus firmly established, let us examine the bill in reference to the imputation of payment, the dominant question in the cause.

One of the requests in the series of propositions submitted by the District Attorney is this: "That if the jury find there was standing on the books of the department a credit to Hough *as disbursing agent*, and Hough was indebted on his bond as collector, the Government would have had the right to have applied such credit to his *account as collector*, notwithstanding he had directed such credit to be applied as a credit on his stamp account.

The court refused this, and, in the series of charges given, said to the jury: "The court is asked by defendants to instruct that Hough had the legal right up to 1868 to appropriate the amount of $6,434.73 allowed him for salary, commission and expenses on 30th of June, 1866, and placed to his credit as disbursing agent. If they find that he did direct in 1866 and 1867 that the same should be applied to the stamp account, and it was enough to settle the stamp account, they will find for defendants."

Is this a correct exposition of the law?

In determining this question let us first ascertain the relation of the parties to it. Hough seeks to apply the credit so as to exonerate the sureties to his bond for stamps. The Government says it ought to be applied to the bond given as collector, inasmuch as that bond is but for $100,000, and Hough is indebted as collector for $143,000, so that if this credit of $6,434.75 goes to the stamp account "it would take from the Government that sum of money." p. 36.

We have thus on the one hand sureties to be benefited by Hough's appropriation of the fund, and on the other no sureties to be injured thereby.

The appropriation by Hough for the benefit of sureties was made in 1867 before the controversy originated. That

made by the department was not until September, 1871, some three years after suit commenced. p. 40.

In the comptroller's letter, 20 May, 1871, he states that the sum of $6,434.75 found due to Hough for expenses was, by the uniform practice of the department, carried to his credit as *disbursing agent*, and that the amount to his credit as disbursing agent, in all $15,453, had been directed to be put to his credit in his account as collector of revenue and under his bond as collector. This balance of $6,434.75 was shown to exist by defendant producing transcript from the Treasury, showing an account between Hough and the Treasury, from July 1, 1865, to June 30, 1866, and an order that the "said balance be carried to the credit of the collector as disbursing agent." p. 35.

It is shown by the legislation, heretofore referred to, that subsequent to 1862 the collector, by act of 1863, was required to dispose of stamps, and by the act of 1864 he was made disbursing agent to pay expenses, &c.

Under these several acts three several bonds were executed with different sets of sureties.

If the contention here was on behalf of the sureties on the bond as disbursing agent, that the money due Hough for expenses as such agent should be applied to their relief, there would be a show of equity, but as Hough is not in default under this bond no such relief is called for.

The proposition of the District Attorney that the Government has the right to transfer the credit placed to the account of the disbursing agent to the account of Hough under his collector's bond after he had appropriated it to his account as stamp agent, has no foundation.

Admitting the right of the Government to make the appropriation in the absence of any direction from Hough, it should have been exercised within a reasonable time.

Here the credit had been carried to his account as disbursing agent, and so remained on the books of the Treasury until May, 1871, three years after the suit had been commenced.

The disbursing account had no closer relation to the account under the collector's bond than to that under the stamp bond.

As disbursing agent, Hough was entitled to no compensation whatever. The debits on that account consisting only of money remitted for expenses, are to be checked by credits for expenses paid. The balance of $15,000 standing to his credit on this account, shows that Hough had paid for expenses largely more than he had received for that purpose; at least to the amount of the difference between this sum and the credit of $6,434.75, for salary, commissions, and expenses.

Again, in the deposition of Hough, he states that "much of the balance due on the stamp account was used by me as disbursing officer in settlement of accounts due from the Government, in paying salaries of assistant assessors, principally." p. 39.

Besides this, his indebtedness as stamp agent arose before any indebtedness on his account as collector, and in addition such indebtedness existed when the credit accrued. Not only ought the credit to be applied to the stamp account, but it must be so applied.

The rule is, a creditor cannot apply a payment to a debt not then payable if there be another debt then due; nor retain it in his hands to apply it to a future indebtedness.

There is, therefore, a stronger equity for the appropriation of this balance to the stamp account than to that under the collector's bond.

The right of appropriation was, however, not with the Government, but with Hough. At the time he made it, as shown by the Treasury transcripts, he was not indebted on the account under his first bond. If anything was due by him, it was on his stamp account, and on this he directed the credit to be applied.

The right of election, as a general rule, is first in favor of the debtor, and the election made by him in this case violates no principle of law or equity.

The cases decided in this court, on the ascription of payments, are as follows:

Mayor vs. Patten, 4 Cr., 317;
Field vs. *Holland*, 6 Cr., 8;
U. S. vs. *January*, 7 Cr., 572;
U. S. vs. *Giles*, 9 Cr., 212;
Taylor vs. *Sandford*, 7 Wheat., 13;
U. S. vs. *Kirkpatrick*, 9 Wheat., 720;
U. S. vs. *Eckford*, 1 How., 251;
Jones vs. *U. S.*, 7 How., 681;
Backhouse vs. *Patten*, 5 Pet., 161.

The first of these cases was an action of debt brought by the Mayor, &c., of Alexandria for the use of Ladd, against Patten, on his bond as Vendue Master.

Patten was indebted to Ladd for goods sold for him at auction, and he was also indebted to him for goods sold by Ladd to him.

The object of the suit was to recover the money in his hands for the goods sold at auction. Patten showed payments attended, as he claimed, by circumstances evidencing an intention to apply them to his indebtedness as Vendue Master, while Ladd claimed that the payments were applied to Patten's indebtedness for the goods he had sold to him.

The Chief Justice thus declares the law:

"It is a clear principle that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payment to which account he pleases, but if he fails to make the application the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately."

In *Field* vs. *Holland* it was held that as neither party had made the application, it becomes the duty of the court, in the exercise of a sound discretion, to do it.

In *United States* vs. *January and Patterson*, suit was brought on two bonds of Arthur, collector—one executed in '97, in which the defendants were surety; the other in '99, in which Robert Patterson was surety. Both were given for the faithful discharge of duties as collector of revenue.

But one account was kept against the collector, which showed him in arrears in 1803 for the sum of $11,000. It was also shown that, terminating the account, when Arthur gave the second bond, the balance due was $6,000.

The defendants, who were sureties on the first bond, relied on an alleged promise of the supervisor of the revenue to apply Arthur's payment to the extinguishment of their liability.

The plaintiff contended that this promise was not, of itself, an appropriation, unless followed by an act of appropriation. This was overruled; the court instructing the jury, the promise was sufficient.

This was the point brought up by writ of error. The syllabus state, that this promise "does not bind the United States, and does not amount to an application of payment."

The opinion by Duval, J., after reciting the general rule, goes on to say, that a *majority* of the court think the ordinary rule, not applicable to such a case as this, "where the

W. Marshall S. McLean

receiver is a public officer not interested in the event of a suit, who receives on account of the United States, where payments are indiscriminately made, and where different sureties, under distinct obligations, are interested, it will be generally admitted that the monies arising due, *and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety on the second bond.*"

In *Taylor* vs. *Sandiford*, the rule is thus laid down: "A person owing money under distinct contracts has, undoubtedly, the right to apply his payments to whichever debt he may choose; and although prudence might suggest an express direction of the application of his payments at the time of their being made; *yet there may be cases in which this power would be completely exercised without any express direction given at the time. A direction may be evidenced by circumstances as well as by words.*"

In *United States* vs. *Kirkpatrick*, STORY, J., says: "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit, the law will apply the payments according to its own notions of justice. *It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and a fortiori at the time of the trial.*

In *Backhouse* vs. *Patton*, the opinion was delivered by McLean, J., in which it is said: "Whether the application must be made by the creditor at the time the money is received, or within a reasonable time afterwards, it is not important in this case to inquire. There may be cases when no application has been made by debtor or creditor—the law will make it."

Again, it is said: "*Having had reasonable time to make his election—is it not too late to do so after the controversy has arisen?*"

In *United States* vs. *Eckford*, the same justice repeats what is stated in *United States* vs. *January and Patterson*, to be the true, general rule on the subject.

In the case before him, Swartout had, under three several appointments as collector, executed three several bonds, and the question was whether payments made by him subsequently to March, 1834, should be applied to the discharge of his indebtedness existing at that time, or whether to the discharge of his indebtedness accruing after that time.

In delivering the opinion the court held that "the officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector, much less can they, by the mere fact of keeping an account current, in which debits and credits are entered, and without *any expresss appropriation of payments, affect the rights of sureties.*

The collector has paid over the funds in his hands without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated and in discharge of a defalcation, which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument."

Jones vs. *U. S.* merely decides that when a running account is kept at the Post Office Department with a postmaster, in which all the postages are charged to him and credit is given for all payments made, this amounts to an election by the creditor to apply the payments as they are successively made to the extinguishment of preceding balances. *This the creditor has the right to do in the absence of instructions from the debtor.*

Mr. Justice Daniel, in delivering the opinion, referring to the conflicting decisions between "the presumed inten-

tion of the debtor, which in some instances is to govern, and the *ex post facto* election of the creditor, which in other instances is to prevail," says: "I should feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favor."

We have thus presented the decisions of this court as showing how far it has acted upon this much controverted doctrine, and we submit they fully justify the refusal of the charge asked and the charge as given.

We repeat both, for they show a case of clear right of the debtor to make the appropriation.

The Government maintained that if the jury found there was on the books of the Department a credit to Hough as disbursing agent, and that Hough was indebted on his bond as collector, then the Government would have the right to have applied this credit to his account as collector, notwithstanding Hough had directed it to be applied to his stamp account.

This is a bold and clean-cut proposition.

It has no regard to the time when Hough gave the direction.

None to the relation of the securities in the bond as disbursing agent, whose account had received this credit.

None to the time when Hough became indebted under the collector's bond, prior to the time of trial.

Without regard to the finding of the jury on these matters, the claim is made for the right of the creditor to take from the account as disbursing agent the credit there entered, and to transfer the same to the account under the collector's bond.

Now, whether this is to be considered as an abstract proposition, or one incorporating the evidence in the case, it is equally untenable.

The dry charge by the court is, that if the jury find that, in 1866 or 1867, Hough did direct that the amount found due to him on 30th June, 1866, and placed to his credit as disbursing agent, should be applied to his stamp account—and it was enough to settle that account—they will find for defendant.

The correctness of the charge would seem to be as far from any legal criticism as is the rejection of the Government's claim of right.

Exception to Evidence.

As to the admissibility of the deposition of Hough, and the correspondence with the Department, objected to as "incompetent and irrevelant," it is only necessary to say that the former was agreed to be *read in evidence*, the defendants agreeing that the officers of the Internal Revenue Department, to whom Hough, in this deposition avers he had sent the direction, would swear they had no recollection of it, and that no such communication could be found in the Department. (See stipulation, p. 10.)

The objection, if sustained, would have violated both the spirit and the express terms of the agreement.

In regard to the correspondence, the objection that it was "incompetent and irrelevant," was not to any particular portion of it, but to the whole. It covered not only the letters written to the Department, but as well as those written by the Department.

It is difficult to understand how it can be said that the Comptroller's letters stating how and when the credit was applied, as, also Hough's deposition to same point, can be

considered either as incompetent or irrelevant, when this was the pivotal question in the case.

Again, no charge was asked as to the effect or value of this evidence.

The objection is sought to be sustained on the case of the *U. S.* vs. *Gilmore*, 7 Wall., 491, giving effect to the 4th section of the act of 3 March, 1797, which enacts that in suits by the United States no claim for a credit shall be admitted on the trial, but such as have been presented to the accounting officers and disallowed.

This has not the remotest application to the case in hand, for here is no claim for a credit *to be allowed*, but a claim that the credit which *has been allowed* should be applied in a particular manner.

We submit, therefore, there is no error in refusing the charge asked or in the charge given.

P. PHILLIPS,
W. HALLET PHILLIPS,
for Def't in Error.